91-390

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1991

DAVID A. NORDSTROM,

Petitioner,

vs.

LINDA E. NORDSTROM,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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77

(a)

QUESTIONS PRESENTED FOR REVIEW

The questions before this Court are (1) whether the courts of the State of Washington may reopen long settled property divisions of military retired members (as a class singularly discriminated against in Washington) in the case before the Court, in spite of federal and state Constitutional and statutory prohibitions. These acts of the courts of the State of Washington center on retrospective application of PL 97-252, codified as 10 U.S. C. 1408, and commonly known as the Former Spouse Protection Act (hereafter FSPA); (2) whether the courts of the State of Washington may recharacterize military retired pay as "deferred compensation" or a "pension", as opposed to the correct federal definition of this pay as "wages", the issue this Court

declined to decide in the case of McCarty v. McCarty, infra, and which this Court MUST NOW DECIDE; and underlying each of the above, (3) whether the FSPA was unconstitutional as an impermissible delegation of exclusive Congressional authority and responsibility, and the corollary issues of the impairment of contractual rights and expectations by retroactive application of subsequent legislation to a final judgment not appealed, and the involuntary servitude imposed as a result thereof.

(b)

LIST OF PARTIES TO THE PROCEEDINGS

At this time there are no additional parties to these proceedings.

TABLE OF CONTENTS AND AUTHORITIES

Table of Contents

(a) QUESTIONS PRESENTED FOR REVIEW i

(b) LIST OF PARTIES TO THE PROCEEDINGS ii

(c) TABLE OF CONTENTS AND AUTHORITIES iii

(d) REFERENCE TO OFFICIAL AND UNOFFICIAL ORDERS 1

(e) GROUNDS FOR JURISDICTION . . . 2

(f) CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED . . . 4

(g) STATEMENT OF THE CASE 5

(h) STATE OF PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED . 11

(i) FEDERAL JURISDICTION 13

(j) ARGUMENT 14

1. The Courts Below Erred in Finding Retrospectively a Divisible Property Right in Petitioner's Future Military Retired Pay, and in Awarding 50% Thereof to the Respondent in Spite of the Unambiguous Language in the 1980 Decree. That Ruling is Clearly Erroneous and Must be Reversed 14

a. The Courts Below Erred in its 1989 Finding that the Law Governing the Original Decree in ths Case Entered in 1980, was a Statute Enacted in 1983, in Violation of both the United States and the Washington State Constitutions 14

(1) The Decree of Dissolution was Clearly Unambiguous 15

b. Retroactive application of the FSPA acts as a forfeiture and is repugnant to the federal and state Constitutions 22

c. The Court of Appeals, after requesting and receiving supplementary materials that reaffirmed that the FSPA was not intended to be applied retroactively, did an end run by creating a "condition precedent" that did not exist, and which was, by the court's own definition, not a condition precedent. That ruling is clearly erroneous and must be reversed 28

2. The Court of Appeals Combined the Alternative Arguments as to the Characterization of Military Retired/Retainer Pay, thereby Avoiding or not Addressing the Issue. In so doing, the Court of Appeals does not Consider a Decree of Dissolution or a Modification thereto as "Any Legal Process Whatever". That Decision or Lack of Decision is Clearly Erroneous and must be Reversed 34

3. The Courts Below Erred in Entering no Finding of Fact or Conclusion of Law Regarding Petitioner's Argument on the Unconstitutionality of the Former Spouses' Protection Act. That Decision, or lack of Decision, is Clearly Erroneous and must be Reversed 42

a. The FSPA is Unconstitutional as an Impermissible Delegation of Exclusive Congressional Authority 42

b. There is No "Property" in Military Retired/Retainer Pay to be Divided, and Such Entitlements are not a "Pension" or Deferred Compensation 45

c. The Court of Appeals improperly interpreted the Constitutional issue 53

d. The only alleged jurisdiction over the subject matter of this action rests on an unconstitutional Federal Statute 55

CONCLUSION 58

(k) APPENDIX (filed separately)

Table of Authorities

SUPREME COURT CASES

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978) 22

Bell v. United States, 366 U.S. 393, 6 L.Ed.2d 834, 40 S.Ct. 438 (1961) 3,47

Energy Reserves v. Kansas Power & Light, 459 U.S. 400, 74 L.Ed.2d 569, 103 S.Ct. 697 (1983) 22

Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963) 49

Free v. Bland, 369 U.S. 663, 8 L.Ed.2d 180, 82 S.Ct. 1089 (1962) 3,44,58

Hisquerdo v. Hisquerdo, 439 U.S. 572, 59 L.Ed.2d 1, 99 S.Ct. 802 (1979 . . . . . pasim

Hodges v. Snyder, 261 U.S. 600, 67 L.Ed. 819, 43 S.Ct. 435 (1923) 24

Kahn v. Anderson, 255 U.S. 1, 65 L.Ed. 469, 41 S.Ct. 224 (1920) . . 37

Knickerbocker Ice Company v. Stewart, 253 U.S. 149, 64 L.Ed. 834, 40 S. Ct. 438 (1920) 44,45,51

Leonard v. United States, 279 U.S. 40, 73 L.Ed. 604, 49 S.Ct. 232 (1928) 37

Locke v. New Orleans, 4 Wall 172, 71 U.S. 172, 18 L.Ed. 334 (1866) . 26

Mansell v. Mansell, 490 U.S. 581, 104 L.Ed.2d 675, 109 S.Ct. 2023 (1989) 3,10,56,57

McCarty v. McCarty, 453 U.S. 210, 69 L.Ed 2d 589, 101 S.Ct 2728 (1981) . . . . . pasim

McCulloch v. Maryland, 4 Wheat 316, 17 U.S. 316, 4 L.Ed. 529 (1818) . 57

McCullough v. Virginia, 172 U.S. 102, 43 L.Ed 382 25

Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950) 60

Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877) 60

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947) 49

Ridgway v. Ridgway, 454 U.S. 46, 70 L.Ed. 2d 39, 102 S.Ct 49 (1981) 58

United States v. Larionoff, 431 U.S. 864, 53 L.Ed.2d 48, 97 S.Ct. 2150 (1977) 3,48

United States v.Mills, 197 U.S. 223, 49 L.Ed. 732, 25 S.Ct. 434, (1904) 36

United States v. Morton, 112 U.S. 1, 28 L.Ed 613, 5 S.Ct. 1 (1884) . . 36

United States v. Standard Oil, 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947) 43

United States v. Tarble, 80 U.S. 397, 20 L.Ed. 597 (1872) 50

United States v. Tyler, 105 U.S. 244, 26 L.Ed. 985 (1882) . . . pasim

United States v. Yazell, 382 U.S. 341, 15 L.Ed.2d 404, 86 S.Ct. 500 (1966) 38

Wissner v. Wissner, 338 U.S. 655, 94 L.Ed. 439, 70 S.Ct. 413 (1950) . . . . . pasim

OTHER FEDERAL CASES

Andrews v. United States, 175 Ct.Cl. 561 (1966) 37

Chambers v. Russel, 192 F.Supp. 425 (N.D. Cal. 1961) 37

Costello v. United States, 587 F. 2d 424 (9th Cir. 1978) cert. den. 442 U.S. 929 (1979) . 3,37,47,49

Goodley v. United States, 441 F.2d 1175 (Ct.Cl. 1971) 47

Hooper v. Hartman, 163 F.Supp. 437, aff'd (9th Cir., 1958) 274 F.2d 469 37,48

Hostinsky v. United States, 292 F. 2d 508, 154 Ct.Cl. 443 (1961) 37,48

Lemly v. United States, 75 F.Supp. 248, 109 Ct.Cl. 760 (1948) 50

Lockhart v. Mittlemann, 123 F.2d 703 (2nd Cir. 1941) 37

Puglisi v. United States, (Ct. Cl. 1977) 564 F.2d 403 cert. den. 435 U.S. 968 (1978) 37

Watson v. Watson, 424 F.Supp. 866 (1976) 37

WASHINGTON STATE CASES

Byrne v. Ackerlund, 108 Wash. 2d. 445, 739 P.2d 1138 (1987) 19

Enrich v. Barton, 2 Wash.App. 954, 471 P.2d 700 (1970) 40

Flannagan v. Flannagan, 42 Wash. App. 214, 709 P.2d 1247 . . 19,21,51 (1985)

Fleming v. August, 48 Wash.2d
131, 291 P.2d 639 (1955) 31,32

Gillis v. King County, 42 Wash.2d
373, 255 P.2d 546 (1953) 26

Hearde v.City of Seattle, 26 Wash.
App 219, 611 P.2d 1375 (1980). . . 27

In Re Marriage of Dessauer, 97
Wash. 2d 831, 650 P.2d 1099
(1982) 18

In re Marriage of Freedman, 35 Wash.
App. 49, 665 P.2d 902 (1983) . . . 40

In Re the Marriage of Giroux,
41 Wash. App. 315, 704 P.2d 160
(1985) 29,30,31,53,54

Kinne v. Kinne, 82 Wash.2d 360,
510 P.2d 814 (1973) 21

Larango v. Larango, 93 Wash. 2d
460, 610 P.2d 907 (1980) 18

Marriage of MacDonald, 104 Wash.2d
745, 709 P.2d 1196 (1985) . . .28,29

Marriage of Mudgett, 41 Wash.App.
337, 341, 704 P.2d 169 (1985). . . 28

Matter of Marriage of Smith,
100 Wash. 2d 319, 669 P.2d 448
(1983) 18

McGill v. Hill, 31 Wash.App. 542,
644 P.2d 680 (1982) 21

Millheisler v. Millheisler, 43
Wash.2d 282, 261 P.2d 69 (1953) . 21

Osicka Estate, 1 Wash.App. 277,
461 P.2d 585 (1969) 40

Ruano v. Spellman, 81 Wash.2d 820,
505 P.2d 447 (1973). 27

Seattle v. O'Brien, 86 Wash.2d 339, 544 P.2d 729 (1976) 27

Shaffer v. Shaffer, 47 Wash.App. 189, 733 P.2d 1013 (1987) 19

Washington Federation of State Employees, AFL-CIO, Council 28 AFSCME v. State, 101 Wash.2d 536, 682 P.2d 689 (1984) 25

Waymire v. Waymire, 10 Wash. App. 262, 517 P.2d 219 (1973) 27

OTHER STATE CASES

In Re Marriage of Battles, 564 N.E. 565 (Ind. App. 3 Dist. 1991) . . . 40

UNITED STATES CONSTITUTION

Article I, section 8 4,55

Article I, section 8, Clauses 12, 13, 14, and 16 35,43,50

Article I, section 9 4,19

Article I, section 9, Cl. 8 48

Article I, section 10 4,22,23

Article VI, clause 2 4,50

Fifth Amendment 4

Thirteenth Amendment . . .4,26,35,41,61

Fourteenth Amendment 4,23,59,61

WASHINGTON STATE CONSTITUTION

Article I, section 2 53

Article I, section 23 23,25

FEDERAL STATUTES

Title 5 United States Code

5 U.S.C. 5532 48

5 U.S.C. 8312 48

Title 10 United States Code,

10 U.S.C. 101(27) 4,36

10 U.S.C. 267 4

10 U.S.C. 276 4

10 U.S.C. 672 4

10 U.S.C. 688 4

10 U.S.C. 801 et seq (UCMJ) . . . 49

10 U.S.C. 1408(FSPA) . . . . . pasim

10 U.S.C. 2771 49

10 U.S.C. 3504(a) 49

Title 28 United States Code

28 U.S.C. 1257(a) 3

28 U.S.C. 2403 (a) 11

Title 29 United States Code

29 U.S.C. 1003(b)(1) 52

Title 37 United States Code

37 U.S.C. 801(1) 49

Title 50 United States Code

50 U.S.C. 501 17

WASHINGTON STATE STATUTES

Wash.Rev.Code.Ann

R.C.W. 6.15.020 .8,11,34,41,42,52,62

R.C.W. 6.16.030 34,41,52,62

R.C.W. 26.16.140 . . . 11,41,53,55,62

OTHER AUTHORITY

Legislative History, P.L. 97-252, Senate Report No. 97-502, pp. 1599- 1600 24

Legislative History, P.L. 101-___, House Report, p. 12194 24

2 C. Sands, Statutory Construction, sec. 41.05, at 261 (4th ed. 1973) 31

26 CFR Ch.1, Sec. 31.340(a)-1(b)(1)(ii) 39

37 Comp.Gen. 207 49

41 Comp.Gen. 715 49

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(d)

REFERENCE TO OFFICIAL AND UNOFFICIAL ORDERS

There are five orders entered in the courts below, as follows:

1. The Findings of Fact, Conclusions of Law and Decree of Dissolution entered by the trial court August 15, 1980, as set out in full in Appendix A.

2. The Order re: Clarification of Military Retirement, upon Findings of Fact and Conclusions of Law made by a court Commissioner, entered on August 29, 1989, as set out in full in Appendix B.

3. The Order re: Clarification of Military Retirement upon Findings of Fact and Conclusions of Law made by a superior court judge, upon motion for revision of commissioner's ruling, entered November 21, 1989 as set out in full in Appendix C.

4. The Opinion of the Court of

Appeals Division III,entered February 26, 1991, as set out in full in Appendix D. (unpublished opinion)

5. The Order denying Petition for Review by the Washington State Supreme Court, entered June 4, 1991, as set out in full in Appendix E.

(e)

GROUNDS FOR JURISDICTION

i. Date of Judgment and time of entry

The judgment sought to be reviewed is the judgment of the Supreme Court of the State of Washington, signed and entered on June 4, 1991, which affirmed without comment or published opinion the judgment of the Court of Appeals, Division III, dated February 26, 1991, also an unpublished opinion, the last ruling on this case.

ii. Date of Order on Rehearing

There was no request for or ruling on rehearing in this case.

iii. Cross Petitions pursuant to Rule 19.5

This is a first petition, and cross petitions have not been filed.

iv. Statutory provisions conferring jurisdiction upon this Court

This action involves a challenge to the constitutionality of 10 U.S.C. 1408. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a), and this Court's decisions in United States v. Tyler, 105 U.S. 244 (1881); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); Bell v. United States, 366 U.S. 393 (1961); McCarty v. McCarty, 453 U.S. 210 (1981); United States v. Larionoff, 431 U.S. 864 (1977); Costello v. United States, 442 U.S. 929 (1979), and Mansell v. Mansell, 490 U.S. 581, (1989).

(f)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The Constitutional provisions involved in this case are Constitution of the United States, Article 1, section 8; Article I, section 9; Article I section 10; Article VI, clause 2; and the Fifth, Thirteenth and Fourteenth Amendments thereto, all of which have been set out in full in the Appendices, as Appendix L. The statutory provisions involved are Title 10 United States Code, specifically 10 U.S.C. 101 (27); 10 U.S.C. 267; 10 U.S.C. 276; 10 U.S.C. 672; 10 U.S.C. 688 which have been set out in full in the appendixces as Appendix M, and 10 U.S.C. 1408, which has been set out in full in the Appendices, as Appendix F and Appendix G. Other than corollary reference, there are no known regulations,treaties or ordinances involved in this action.

STATEMENT OF THE CASE

The parties to this action were married in May, 1961, and were permanently separated in February 1979. Petitioner herein was inducted into the United States Air Force on December 15, 1961. On August 15, 1980, the Court entered the Findings of Fact and Conclusions of Law, and Decree of Dissolution following trial on the matter, on a then agreed to document approved by counsel for both parties. That Decree was not appealed, and became final and binding upon the parties on September 14, 1980.

On February 1, 1983, Title 10, section 1408 of the federal code, known as the FSPA came into effect. That statute was not retroactive in viola-

tion of the ex-post facto restriction of the Constitution, nor was it ever intended to be retroactive as the 1990 Congressional Record (Appendix H) and the letter to the Petitioner from a member of the United States Senate to the Petitioner herein indicate (Appendix I), but was merely an attempt (an impermissible delegation of Congressional authority as will be discussed later), to partially remove the preemption of consideration of military retired/retainer pay as property, as had been the existing law of the land since 1882, U.S. v. Tyler, infra, and as this Court reaffirmed in the McCarty v. McCarty decision, infra. The Former Spouses' Protection Act, applied retroactively, was the statute upon which jurisdiction in this action was predicated.

Nearly nine years following the entry of the original Decree of Dissolution, the Respondent filed a motion

to reopen the Decree of Dissolution for the stated purpose of clarifying the Decree as to the Appellant's military retired pay, the very retroactive application of law prohibited by the law itself and the Constitution of the United States.

The matter was heard by a Court Commissioner on July 24, 1989, and upon Findings of Fact and Conclusions of Law entered an order effectively modifying the Decree of Dissolution on August 29, 1989. That decision was timely noted for revision of the commissioner's ruling by a judge, and a hearing thereon was held on October 26, 1989. Upon Findings of Fact and Conclusions of Law, an Order denying revision of the commissioner's ruling was entered on November 21, 1989.

The trial court's final order was timely appealed to the Court of Appeals on December 13, 1989. The trial court invented an ambiguity in the Decree of

Dissolution. The Court of Appeals did not find an ambiguity, but invented conditions to support an otherwise erroneous decision of the lower court. The Washington State Supreme Court simply refused to act, refused to correct obviously erroneous decisions.

The trial court and the Court of Appeals ignored the argument of Petitioner as to the proper characterization of military retired/retainer pay and failed to properly address the application of Washington State statutory law, specifically R.C.W. 6.15.020 (formerly R.C.W. 6.16.030).

The Court of Appeals made an unsupported and erroneous finding that the Constitutional challenge made by the Petitioner had been previously decided. The Court of Appeals affirmed the decision of the trial court which concluded that the court should clarify an unambiguous divorce decree, contrary to the express language therein, the

express intent of the parties, Constitutional prohibitions, and the FSPA.

The Court of Appeals decision of February 26, 1991, summarily avoided the Constitutionality issue, and cited the wrong authority in so doing. Similarly, the Court of Appeals correctly stated and then misapplied prior definitive law as to the nature of the language in the original Decree of Dissolution. The Court of Appeals also misstated Petitioner's argument as to the nature of the characterization of military retired/retainer pay and misapplied existing Washington State statutory law. That opinion was timely noted for review in the Washington State Supreme Court on March 27, 1991.

The Supreme Court of the State summarily denied review of the decision of the Court of Appeals, Division III, which was filed on February 26, 1991, which remains the last definitive ruling in this case, in keeping with

the pattern in the State of Washington to discriminate against the military member whenever possible. The judgment of the Washington State Supreme Court was entered on June 4, 1991. Notice of Petition for Writ of Certiorari to this Court was filed in the Supreme Court of the State of Washington, the court possessed of the record herein, on August 30, 1989.

The only alleged jurisdiction over the subject matter of this action rests on an unconstitutional Federal Statute. The Washington courts consistently and categorically ignore federal statutes and case law established by this Court, much as the California courts simply ignored this courts ruling in Mansell v. Mansell, 490 U.S. 581, 104 L.Ed.2d 675, 109 S.Ct. 2023 (1989). The Washington courts, when it comes to the class of persons known as military retirees, consistently and categorically speaks in alternative terms,

depending upon the situation. Military retired pay is pay, for purposes of avoiding RCW 6.16.020, and then is not pay, but a pension, for the purposes of avoiding RCW 26.16.140.

This Petition is docketed within ninety days of the entry of the order denying review by the Supreme Court of the State. As this action involves a direct constitutional challenge to an Act of Congress, 28 U.S.C. 2403 (a) may apply, and this Petition is being served on the Solicitor General of the United States.

(h)

STATE OF PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE PRESENTED

The question of the interpretation of federal law respecting the character of military retired pay; the question as to the constitutionality of the FSPA in its entirety; the question of the constitutionality of retroactive appli-

cation of that statute; the question of the violation of the Constitutional restrictions impairing contract; and the denial of the courts jurisdiction, were argued in written brief in all forums below, and in oral argument in all forums in which argument was allowed. In the court of first instance, the court commissioner would not permit oral argument on any constitutionality issues, as was true in all forums below, with initial admonitions after reviewing briefs, that the constitutional issues have already been settled. Similarly, the jurisdictional challenge is summarily dismissed, as the courts base jurisdiction on the FSPA, and not allowing a challenge to the FSPA itself, dispose of any basis to argue subject matter jurisdiction. The court of first instance invented an ambiguity to avoid the retoactivity issue. The Court of appeals invented conditions not present nor intended, to

avoid the retroactivity issue. This matter is critically important. The very morale and support of the Armed Forces is at stake. In McCarty, this Court did not decide the issue of whether the states had authority to recharacterize retired pay from the federal definition and statutory basis of "current" compensation, i.e. pay, to their own definition of "deferred" compensation, i.e. pension, as the situation dictated, and then being able to call it pay, or wages, in other contexts. THAT QUESTION NEEDS AN ANSWER!

This dual characterization cannot continue. This Court can, and must set this matter to rest.

(i)

FEDERAL JURISDICTION

This case originates in state court, and the federal courts below have not had jurisdiction.

ARGUMENT

1. The Courts Below Erred in Finding Retrospectively a Divisible Property Right in Petitioner's Future Military Retired Pay, and in Awarding 50% Thereof to the Respondent in Spite of the Unambiguous Language in the 1980 Decree. That Ruling is Clearly Erroneous and Must be Reversed.

   a. The Courts Below Erred in its 1989 Finding that the Law Governing the Original Decree in ths Case Entered in 1980, was a Statute Enacted in 1983, in Violation of both the United States and the Washington State Constitutions.

On August 14, 1980, the parties finalized their Decree of Dissolution, the purpose of which was to effect a final and complete settlement all of their rights, including their property rights. That document was signed by the Counsel for the Respondent herein and speaks for itself, and was a binding final document that forever set to rest the issues of division of property

between these litigants.

On February 1, 1983, the FSPA came into effect. That statute was not retroactive in violation of the ex-post facto restriction of the Constitution, but was merely an attempt (an impermissible delegation of congressional authority as discussed below), to remove the pre-emption of consideration of military retired/retainer pay established by the McCarty v. McCarty decision, 453 U.S. 210, 69 L.Ed 2d 589, 101 S.Ct 2728 (1981), and is the statute upon which Respondent's action was predicated. Even were that statute constitutional and permissible, when it came into effect in February, 1983, it did not speak to, nor negate a legally binding two and one-half (2 1/2) year old final contract between the parties.

(1) The Decree of Dissolution was Clearly Unambiguous.

The decree of dissolution in this case was entered by the Court on August

15, 1980. That decree, in pertinent part states at page 6 (Appendix A-10, paragraph VI):

> VI.
> That the parties have already divided the community property and the property shall remain with the party holding the same. Petitioner's future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment, subject to the result of any decision reached by the United States Supreme Court. However if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct. 802 (January, 1979, then the pension shall revert in its entirety to Petitioner. (Emphasis added).

This Court did adopt the ruling of Hisquerdo v. Hisquerdo, 439 U.S. 572, 59 L.Ed.2d 1, 99 S.Ct. 802 (1979) in McCarty v. McCarty, supra. That condition subsequent having been met, the military retired pay (erroneously denominated as a pension), reverted in its entirety to Petitioner, David A. Nordstrom.

The language of the decree of dis-

solution is clear. If the United States Supreme Court adopted the ruling of Hisquerdo as it did in McCarty, then the "pension" reverted in its entirety to Petitioner, David A. Nordstrom. Further, the courts of the State of Washington, or any other state have no jurisdiction over matters concerning a military member, absent compliance with the Soldiers and Sailors Civil Relief Act, 50 U.S.C. 501. That act was not complied with.

Upon the occurrance of the condition subsequent, the resulting decree simply reads in paragraph VI as:

> That the parties have already divided the community property, and the property shall remain with the party holding the same. Petitioner's future military retirement... shall revert in its entirety to Petitioner.

That language was not and is not ambiguous. That language was intended to finalize this action with knowledge of the impending change. The decree

was not intended to permit one of the other of the parties to come back and upset a final settlement of property.

If this Court were to read each possible condition, this Court will find that Washington did adopt the Hisquerdo ruling. Larango v. Larango, 93 Wash. 2d 460, 610 P.2d 907 (1980). The pension plan was not upheld, and in fact, Washington then specifically stated that the courts do error in classifying military retired pay as community property and in dividing it. In Re Marriage of Dessauer, 97 Wash. 2d 831, 650 P.2d 1099 (1982). The fact that the Dessauer ruling was overruled, albeit erroneously, in Matter of Marriage of Smith, 100 Wash. 2d 319, 669 P.2d 448 (1983), (post FSPA) did not negate the ruling as to the Dessauer case itself, or anything retrospective, including this case. The Smith ruling could only operate as to Smith and prospectively. The fact

that the FSPA (although unconstitutional), purports to overrule a portion of McCarty, does not negate the ruling of McCarty as to the McCarty case itself, or anything retrospective, including this case. It to could only operate prospectively. United States Constitution, Article I, sec. 9.

The language in paragraph VI of the decree is clear, and refers directly to this Court. Washington has long recognized the danger of permitting relitigation of single issues (except in practice as applied to military retirees). Flannagan v. Flannagan, 42 Wash.App. 214, 709 P.2d 1247 (1985). It is well settled that where the Settlement Agreement is not modifiable, the trial court lacks jurisdiction to modify the agreement/order of the court. Byrne v. Ackerlund, 108 Wash. 2d. 445, 739 P.2d 1138 (1987); Shaffer v. Shaffer, 47 Wash.App. 189, 733 P.2d 1013 (1987). The record and file in

this case show that the character and future possible existence of military retired pay was considered in 1980. The parties entered into an agreement, ordered and endorsed by the court, and the final decree was entered, stating:

> That the parties have already divided the community property and the property shall remain with the party holding same. Petitioner's future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment, subject to the result of any decision reached by the United States Supreme Court. However, if it adopts the rulings of Hisquierdo v. Hisquierdo, 99 S.Ct. 802 (January, 1979), then the pension shall revert in its entirety to Petitioner.

Once this Court adopted the rulings of Hisquerdo, as it specifically did in McCarty, the operative portions of that decree, fully anticipated by both parties as one of two possible results, can only be read as "Petitioner's future military retirement ...shall revert in its entirety to

Petitioner." Such agreements are not subject to modification under Washington State case law. McGill v. Hill, 31 Wash.App. 542, 644 P.2d 680 (1982); Millheisler v. Millheisler, 43 Wash.2d 282, 261 P.2d 69 (1953); Kinne v. Kinne, 82 Wash.2d 360, 510 P.2d 814 (1973).

Even Flannagan v. Flannagan, supra, relied upon by the Respondent establishes parameters. That case required that reopening, under facts unique to that case (no agreement and no legal counsel), be (1) within a reasonable time, and (2) the movant must allege facts that if proven would demonstrate that the division was unfair or inequitable because of the McCarty decision, supra. No such allegation was made in this action. The action was not brought within a reasonable time - nine years. The parties did have a binding agreement. Both parties had legal counsel. The

agreement was fair. The judgment entered upon that agreement was, and is controlling by its own terms.

b. Retroactive application of the FSPA acts as a forfeiture and is repugnant to the federal and state Constitutions.

This action is intended to interfere with, and destroy, alleged property rights. This is repugnant to case law and the United States Constitution, Art. I, section 10, Allied Structural Steel Co. v.Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978); Energy Reserves v. Kansas Power & Light, 459 U.S. 400, 74 L.Ed.2d 569, 103 S.Ct. 697 (1983).

On August 14, 1980, Petitioner had no vested contractual right to military retired pay, nor does he have such a vested right today. By virtue of the final Decree of Dissolution, drawn by competent legal counsel, and accepted by both parties, any and all interest

there may have been in future military retired/retainer pay (erroneously listed as a "pension"), was fully awarded to the Petitioner, upon the occurance of a condition subsequent, and for the state courts to take legislative action through judicial action as was done in this case, significantly impaired Petitioner's right to receive future wages free of servitude, and is unconstitutional under the United States Constitution, Article I, section 10. The contract clause is applicable to the states through the Fourteenth Amendment, and is reiterated in the Washington State Constitution, Art. I, sec. 23.

Retroactive application of FSPA violates the United States Constitution and case law which prohibit laws that impair vested property rights. The FSPA was not intended to be retroactive to apply to dissolution decrees which became final during the so called

"window" period between the time McCarty was decided on June 26, 1981, and the date FSPA became effective on February 1, 1983, let alone retroactive to any final order of a date prior to June 26, 1981. The Congressional record shows that Congress considered making FSPA fully retroactive, but did not, Legislative History, P.L. 97-252, Senate Report No. 97-502, pp. 1599-1600. Such legislative was suscinctly restated in 1990 during work on P.L. 101-_____, amending the FSPA. Legislative History, P.L. 101-_____, House Report p. 12194.

The Washington courts should not have permitted retroactive application of FSPA to undo a valid and final judgment, and violate long settled legal principles and holdings of this Court.

In Hodges v. Snyder, 261 U.S. 600, 603, 67 L.Ed. 819, 43 S.Ct. 435 (1923), this Court stated:

> [T]he private rights of parties which have been vested by the judgment of a court cannot be

> taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. (Citing Pennsylvania v. Wheeling Bridge Co., 18 How. 421, 429; The Clinton Bridge, 10 Wall. 454, 463; United States v. Klein, 13 Wall. 128, 146; McCullough v. Virginia, 172 U.S. 102, [43 L.Ed 382].

Again, in McCullough, this court stated:

> Legislation may act on subsequent proceedings, may abate actions pending but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. McCullough, supra, at 123-124 (1898).

Washington State courts in interpreting the Washington State Constitution, Article I, section 23, have held that the impairment of contractural obligations prohibitions in the State Constitution are substantially the same as the federal provisions, and must be given the same effect. Washington Federation of State Employees, AFL-CIO, Council 28 AFSCME v. State, 101 Wash.2d 536, 682 P.2d 689 (1984).

While all retrospective acts are not, per se, ex post facto, those that impose penalties or forfeitures are. Locke v. New Orleans, 4 Wall 172, 71 U.S. 172, 18 L.Ed. 334 (1866). Here the State of Washington imposes a forfeiture on Petitioner's future wages, under color of the FSPA, an unconstitutional act, and in direct violation of the Thirteenth Amendment. Military personnel contract to obey, to defend, to serve their country, but not to be in servitude for the remainder of their lives to other than their country.

Under Washington State law, statutes may not be given retroactive effect, regardless of legislative intent, where the effect would interfere with vested rights, impair obligations of contract or deprive a person of property without due process of law. Gillis v. King County, 42 Wash.2d 373, 255 P.2d 546 (1953); Hearde v.

City of Seattle, 26 Wash.App 219, 611 P.2d 1375 (1980). A statute impairs the obligation of contract if it diminishes the value in any degree. Seattle v. O'Brien, 86 Wash.2d 339, 544 P.2d 729 (1976). Legislative action impairs the obligation of contract if it directly, or indirectly, lessens values or alters terms. Ruano v. Spellman, 81 Wash.2d 820, 505 P.2d 447 (1973). Statutes enacted subsequent to the date of a lawful judgment cannot operate retrospectively to set aside, annul or change liability on the judgment. Waymire v. Waymire, 10 Wash. App. 262, 517 P.2d 219 (1973).

Washington State courts have interpreted the State Constitution per these principles, except in the case of military retirees. What the courts below did in Petitioner's case in 1989 was to rewrite paragraph VI of the 9 year old decree, by deleting everything in that paragraph after "... divided

equally between the parties." In so doing, they have ignored this Court, and the Constituions of both the State and the United States. The courts cannot rewrite a agreement of the parties. Marriage of Mudgett, 41 Wash. App. 337, 341, 704 P.2d 169 (1985).

(c) The Court of Appeals, after requesting and receiving supplementary materials that reaffirmed that the FSPA was not intended to be applied retroactively, did an end run by creating a "condition precedent" that did not exist, and which was, by the court's own definition, not a condition precedent. That ruling is clearly erroneous and must be reversed.

The Court of Appeals cited Marriage of MacDonald, 104 Wash.2d 745, 709 P.2d 1196 (1985) as controlling on the issue of retroactive application. That holding has been overridden by the Congress of the United States in the amendments to the FSPA and the accompanying legislative history which were

provided to the Court of Appeals, materials which clearly state as the Court of Appeals recognized, that the FSPA was never intended to be retroactive (see Appendix H). Notwithstanding, MacDonald is clearly distinguishable from the present case, both on its own facts, and applying the rationale of Marriage of Giroux, infra.

In MacDonald, supra, the service member was retired, and the trial court applied federal law as it understood it to be at that time. The Court of Appeals heard that case during the appeal period, before the case became final and binding on the parties. In the present case, the Petitioner was not eligible to retire until December, 1981, and the Decree was not appealed. The courts below heard the present case well outside the parameters of MacDonald, and the ruling of the Court of Appeals that MacDonald controls the present case is unfounded in law or in

fact.

Even assuming that there was a "property" right, which Petitioner specifically denies, this case is factually distinguishable from In Re the Marriage of Giroux, 41 Wash. App. 315, 704 P.2d 160 (1985). In Giroux, the Decree of Dissolution was concurred in by the former spouse only under protest on the specific issue of the alleged value of the military retired pay. The husband in that case had already "retired" from active duty. There was a contested issue, a difference in the expectations of the parties. In Giroux the court addressed retroactivity in a totally different context. The court stated in Giroux at page 319:

> However, to determine the constitutionality of retroactive legislation, the proper inquiry is not whether vested rights have been interfered with, but whether 'settled expectations honestly arrived at with respect to substantial interests' will be defeated.

2 C. Sands, Statutory Construction, sec. 41.05, at 261 (4th ed. 1973).

The parties in Giroux clearly had differing expectations. The appellants attorney so indicated when he signed the Decree "under protest". Id at 317. In the Petitioner's case, there were no differing expectations. The parties sought to finalize the action by allowing for and anticipating either a restatement of existing law as then understood, or a rejection of that law in the upcoming McCarty, supra, decision.

Applying the test in Giroux, supra, to Petitioner's case, settled expectations, honestly arrived at with respect to substantial interests, have been defeated by the courts below, by falacious reasoning and invention, unfounded in law or in fact. The Court of Appeals used the definitions contained in Fleming v. August, 48 Wash.2d 131, 291 P.2d 639 (1955), in defining

conditions precedent and subsequent.

The Court then invented a "condition precedent" where none existed, in spite of that accepted definition. A "condition precedent must be a condition precedent to the contract becoming a valid obligation and not merely precedent to its payment." Fleming, supra, at 135. (Emphasis added). In Petitioner's case there was a valid binding contract, final and unappealed, that had only a condition precedent to payment - Mr. Nordstrom's retirement. By the Court of Appeals own definition, this does not rise to a "condition precedent".

There was clearly a condition subsequent, and it was clearly met. The Decree of Dissolution, signed by counsel for both parties and approved without reservation by counsel for the Respondent, stated that

> Petitioners future military retirement shall be divided equally between the parties... subject to the result of any decision reached by the United

States Supreme Court. However, if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct. 802 (January 1979), then the pension shall revert in its entirety to Petitioner.

That language is clear and unambiguous. It clearly anticipated the upcoming decision in McCarty, supra, as all members of the family law bar were intimately aware of the ruling in Hisquerdo, supra, and were anticipating a definitive ruling from this Court as applied to military retired/retainer pay, as conceded by Respondent's counsel in the court of first instance upon the re-opening of this action in 1989. This Court did adopt the ruling of Hisquerdo, supra. The condition subsequent in the Decree of Dissolution in Petitioner's case was met, precisely met. The Court of Appeals, through judicial action, attempted to rewrite the Decree, to invent a condition precedent to avoid having to honor the fully satisfied condition subsequent.

(2) The Court of Appeals Combined the Alternative Arguments as to the Characterization of Military Retired/Retainer Pay, thereby Avoiding or not Addressing the Issue. In so doing, the Court of Appeals does not Consider a Decree of Dissolution or a Modification thereto as "Any Legal Process Whatever". That Decision or Lack of Decision is Clearly Erroneous and must be Reversed.

Petitioner argued that military retired/retainer pay was not property. Petitioner alleges that such pay is wages, and as such is not divisible in futuro. Petitioner also argued that even though the courts Washington State improperly characterize such future wages as a pension, then Washington State statutory law, (R.C.W. 6.15.020, formerly R.C. W. 6.16.030) specifically prohibit the division of the "pension", under "any legal process whatever." The Court of Appeals combined both alternatives into one sentence, obfuscating the issue and avoiding any intelligible answer.

As will be discussed below, Con-

gress alone has the power and authority to regulate pay for military service and to determine what constitutes military service for which compensation is required or payable. United States Constitution, Article I, section 8, Clauses 12, 13, 14, and 16. The perpetuation of the mischaracterization of retired pay as "pension" or "deferred compensation" is radically inconsistent with federal law respecting the pay.

The courts of the State of Washington have absolutely no authority to garnish or "divide" Petitioner's current pay for the benefit of another not his spouse, as a property right, as to do so would be repugnant to the Thirteenth Amendment of the Constitution of the United States, by placing Petitioner in a state of involuntary servitude. The retired/retainer pay paid to a member of the retired reserve is unassailable as a property right other than community

property, and then it only becomes "property" as it is earned. 10 U.S.C. 101(27) defines pay for all of Title 10. That section lists as "pay", inter-alia, basic pay, hazardous pay, retainer pay, retired pay and incentive pay. There are no differentiations. Each is a wage, earned day to day, and only payable after they are earned.

Congress has determined that while the military member is on an indefinite service contract with this nation, he will continue in the capacity of his "retiring" rank unless he violates the terms and conditions of his employment contract with the United States Armed Forces. Congress has expressly retained the inactive duty member and makes monthly (periodic) payments to him in consideration for his continuing (but reduced) service to the United States Armed Forces. United States v. Morton, 112 U.S. 1, 28 L.Ed 613, 5 S.Ct. 1 (1884); United States v.Mills,

197 U.S. 223, 49 L.Ed. 732, 25 S.Ct. 434, (1904); Kahn v. Anderson, 255 U.S. 1, 65 L.Ed. 469, 41 S.Ct. 224 (1920); Leonard v. United States, 279 U.S. 40, 73 L.Ed. 604, 49 S.Ct. 232 (1928); Puglisi v. United States, Ct. Cl. 1977) 564 F.2d 403 cert. den. 435 U.S. 968 (1978); Lockhart v. Mittlemann, 123 F.2d 703 (2nd Cir. 1941); Andrews v. United States, 175 Ct.Cl. 561 (1966); Chambers v. Russel, 192 F.Supp. 425 (N.D. Cal. 1961); Hooper v.Hartman, supra; United States v. Tyler, 105 U.S. 244 (1882); Costello v. United States, 587 F.2d 424 (9th Cir. 1978) cert. den. 442 U.S. 929 (1979); Watson v. Watson, 424 F.Supp. 866 (1976); Hostinsky v. United States, 292 F.2d 508, 154 Ct.Cl. 443 (1961).

For over one hundred years, the federal courts have recognized and held that in the absence of a retainer paid to the military member on inactive duty status, the United States would be

without right to subject the member to (1) continuing obligations and restrictions, or (2) recall to active duty, United States v. Tyler, supra.

Petitioner contends that the passage of FSPA did not enable state courts to retroactively recharacterize military retired pay, let alone recharacterize it at all. In United States v. Yazell, 382 U.S. 341, 15 L.Ed.2d 404, 86 S.Ct.500 (1966), this Court addressed the priority of application of state and federal law stating:

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. [Free v. Bland, 369 U.S. 663, 666 (1962); [Gibbons v. Ogden, 9 Wheat. 1, 210-211 (1824), cited with approval in Ridgway v. Ridgway, 454 U.S. 46 (1981).

The inescapable conclusion is that the state law must yield to the federal statutory schema. The retrospective division of military retired pay, par-

ticularly a purely speculative expectancy not vested or of any present value at all, as was done in this case, unconstitutionally imposes a financial burden upon Appellant, and violates both the Federal and State Constitutions.

The dual characterizations cannot co-exist; military retired pay cannot be earnings in order to compensate the "retired" member for his continuing services and be deferred compensation to provide a gratuity to the "retired" member for his past services. It is, indeed, the former, and as such is wages, earned day to day, clearly the separate property of the individual earning that wage day to day. See 26 CFR Ch.1, Sec. 31.340(a)-1(b)(1)(ii). It does not become property at all until earned and payable. The community or separate character of property is determined as at the time of its acquisition, Osicka Estate, 1

Wash.App. 277, 461 P.2d 585 (1969); Enrich v. Barton, 2 Wash.App. 954, 471 P.2d 700 (1970). Here, the "property" sought by the Respondent is not yet acquired, and, indeed, is not yet "property". The State of Indiana recently addressed the same issue, and found that for "retired or retainer pay to constitute property" the individual had to have a right to receive such pay. As is with the present case, the Court in Indiana was faced with an individual who had not yet retired at the time the dissolution was entered, therefore had no "right" to receive retired pay, therefore it was not property. In Re Marriage of Battles, 564 N.E. 565 (Ind. App. 3 Dist. 1991)

Property divisions wherein one party's wages and salary earned after the separation are awarded to the other party are disfavored as such wages are separate property. In re Marriage of Freedman, 35 Wash.App. 49, 665 P.2d 902

(1983); R.C.W. 26.16.140. Indeed, to do so places the paying party in a position of involuntary servitude, repugnant to the Thirteenth Amendment.

When the courts of the State of Washington improperly recharacterize military retired/retainer pay as "property", as a "pension", in contravention of federal statutory and case law, e.g. Wissner, supra, even then a division of that mischaracterized pay cannot be made by state law. R.C.W. 6.16 .030, as in effect at the time this action came before the courts, simply and clearly prohibited division. (See Appendix K). That statute was rewritten and recodified in 1987 as R.C. W. 6.15 .020, however, the result is identical due to the operation of federal law. To prohibit garnishment is to prohibit division. Hisquerdo, supra, at 584. Until, and only until the Congress of the United States redefines military retired pay - creates

military "pensions" - with right to payment without service; until it creates a deferred compensation system and severs the ties with the retiree, then military retired/ retainer pay remains wages - current wages for current services. If, and only if, that occurs, will the State of Washington be able to execute, attach, seize or garnish a portion of that "pension", and then only if the legislature amends R.C.W. 6.15.020 to openly discriminate against that class of federal "pensioner".

(3) The Courts Below Erred in Entering no Finding of Fact or Conclusion of Law Regarding Petitioner's Argument on the Unconstitutionality of the Former Spouses' Protection Act. That Decision, or lack of Decision, is Clearly Erroneous and must be Reversed

(a) <u>The FSPA is Unconstitutional as an Impermissible Delegation of Exclusive Congressional Authority</u>.

The Uniformed Services Former

Spouse Protection Act, codified at 10 U.S.C. 1408, hereinafter FSPA, was enacted in 1982 and became effective February 1, 1983. That act is an unconstitutional delegation of exclusive authority by Congress. Clearly, the raising and maintaining of the military is exclusively a function reserved by the United States Constitution to Congress. By virtue of the Constitutional reservation of authority to Congress, likewise, Congress may not delegate its authority.

Congress alone has the power and authority to regulate pay for military service and to determine what constitutes military service for which compensation is required or payable. United States Constitution, Article I, section 8, Clauses 12, 13, 14, and 16; United States v. Standard Oil, 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947) [holding personnel affairs/ pay subject exclusively to U.S. regula-

tions]; Free v. Bland 369 U.S. 663, 8 L.Ed.2d 180, 82 S.Ct. 1089 (1962) [holding that federal law and congressional enactments control the determination of the character of retired pay as present earnings]; McCarty v. McCarty, supra. State courts may not redefine military retired pay. Wissner v. Wissner, 338 U.S. 655, 94 L.Ed. 439, 70 S.Ct. 413 (1950).

A similar question was decided in Knickerbocker Ice Company v. Stewart, 253 U.S. 149, 64 L.Ed. 834, 40 S. Ct. 438 (1920). Congress is exclusively authorized by the Constitution to fix and address remedies for seaman injured at sea. Congress enacted legislation which provided an election of remedies for the seaman under the various laws of the various states. This Court held in that case that the delegation of power to the states which would control or affect the Congressional schema was an unconstitutional delegation of

authority by Congress.

Given similar circumstances in the case of military pay, Petitioner urges this Court to find that FSPA is likewise unconstitutional. The FSPA purports to delegate to each state the authority to "treat" the pay "in accordance with the laws of the State". This is precisely the issue laid to rest by the Supreme Court in Knickerbocker. Where the delegation abdicates to the states a power/authority granted exclusively by the Constitution to Congress, the Act is an impermissible delegation of non-delegable power.

(b) There is No "Property" in Military Retired/Retainer Pay to be Divided, and Such Entitlements are not a "Pension" or Deferred Compensation.

This Court decided in McCarty v. McCarty, supra, that military retired pay was the personal entitlement of the military member and that state courts

were preempted from dividing the pay. This Court declined in McCarty to rule on the remaining question of whether or not a state could recharacterize the pay from current earnings to deferred compensation. The time has now come to rule on this important issue. This court in McCarty did, however, confirm the characterization of more than one hundred years of federal statutory and case law, Wissner v. Wissner, supra; United States v. Tyler, 105 U.S. 244, 26 L.Ed. 985 (1882). The characterization of the pay as a "personal entitlement" and "current earnings" were valid at the time of the Superior Court's original Decree in this case. McCarty, supra, was merely a statement of what the law had always been.

The perpetuation of the mischaracterization of retired pay as "pension" or "deferred compensation" as promulgated by the bar and judiciary of the State of Washington, is radically

nconsistent with federal law respec-
ing the pay. Petitioner is under
ontract for services and is, there-
ore, an employee of the United States
ir Force, continuing to serve the
nited States Air Force as a non-com-
issioned officer on retired reserve
tatus. Petitioner was not receiving
etired pay at the time of the dis-
olution. His ability to receive
etired pay at this time is established
y federal statute. Bell v. United
tates, 366 U.S. 393, 6 L.Ed.2d 834, 40
.Ct. 438 (1961) [holding that a
oldier's entitlement to pay is
ependent upon a federal statutory
ight]; Goodley v. United States, 441
.2d 1175 (Ct.Cl. 1971); Costello v.
nited States, 587 F.2d 424, (9th Cir.,
978) cert. den., 442 U.S. 929 (1979)
stating "the contract seems to mean
hat Stevens will receive the pay
uthorized by statute from time to time
he performs his service"], and is a

early appropriation by Congress in consideration for his continuing service and observance of restrictions. United States v. Larionoff, 431 U.S. 864, 53 L.Ed.2d 48, 97 S.Ct. 2150 (1977). [Forfeiture of pay upon employment subject to "supervision and control" of foreign government; Hostinsky v. United States, 292 F.2d 508 (Ct.Cl. 1961)], [prohibition against dual officer status/pay; Hooper v. Hartman, 163 F.Supp. 437, aff'd (9th Cir., 1958) 274 F.2d 469 (Rear Admiral tried by court martial, when found guilty, forfeited right to earn retired pay)], and previously cited cases.

Other restrictions include: (a) reductions in pay if certain employment accepted (5 U.S.C. 5532); (b) forfeiture of pay for certain crimes (5 U.S.C. 8312); (c) forfeiture if employed by foreign government (U.S. Const. Art. I, sec. 9, Cl. 8); (d) forfeiture of pay for employment with

defense work for private firms within three years of retirement (37 U.S.C. 801(1)); (e) recall involuntarily (10 U.S.C. 3504(a)); (f) forfeiture if foreign citizenship is acquired (37 Comp.Gen. 207, 41 Comp.Gen. 715); (g) subject to UCMJ.

Thus, the sustaining of retainer pay as a "personal entitlement" and the "current earnings" characterization is crucial to federal goals and objectives, United States v. Tyler, supra; Costello v. United States, supra; 10 U.S.C. section 2771; McCarty v. McCarty, supra. Consequently, state courts are preempted from recharacterizing the pay as deferred compensation, Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947); Wissner v. Wissner, supra.

Military retired pay is paid to

the military member as a "personal entitlement" for personal services rendered to the United States Armed Forces. Wissner v. Wissner, supra; Lemly v. United States, 75 F.Supp. 248, 109 Ct.Cl. 760 (1948); McCarty v. McCarty, supra.

State courts are preempted upon a showing of (1) an expression of Congressional purpose or intent to preempt the field, (2) pervasiveness of the schema, (3) nature of the field as federal in character, and (4) the inherent need for nationwide uniformity. Congress has preempted the field and has established a pervasive schema by exercising its authority pursuant to the United States Constitution, Article I, section 8, cls. 12, 13, 14, and 16; Article VI, clause 2. Accordingly, the field is exclusively federal in character, United States v. Tarble, 80 U.S. 397, 20 L.Ed. 597 (1872), and Congress may not delegate its exclusive

authority over this purely federal and Constitutionally mandated responsibility. Knickerbocker, supra.

It is imperative to maintaining the stability of the armed forces that the consideration a member receives for his service is uniform and does not vary from state to state. Flannagan v. Flannagan, supra, destroys this stability in Washington by allowing the retroactive application of FSPA, creates diversity of application of a federal statute between the states. The only possible rationale for the Flannagan decision is that neither party had legal counsel, nor had they entered into an agreement binding themselves, a factual basis totally opposite of Petitioner's case.

Even if the FSPA were a constitutional act, which Petitioner denies, the division of such retired pay is not in accordance with "the law of the jurisdiction" [Washington]. 10 U.S.C.

1408(c)(1). If the Washington State courts define military retired pay as a "pension", an erroneous characterization, a division of that "pension" is prohibited by R.C.W. 6.15.020.

Although the state legislature attempted to specifically target military retired pay in the 1987 amendments by adding subparagraphs (2) and (3) to that statute, the last section of subparagraph (3) specifically excludes those plans exempted from ERISA in 29 U.S.C. 1003(b)(1). Military retired pay is so excluded. However, the law in effect at the time of this dissolution (1980) was the predecessor of R.C.W. 6.15.020, R.C.W. 6.16.030, which simply and absolutely forbad the division of this "pension". If the Washington courts define military retired pay as wages, the correct characterization, the designation of those future wages as the "community property" of a non-existent community, is repugnant to

R.C.W. 26.16.140, and Washington State Constitution, Article 1, sec. 2.

(c) The Court of Appeals improperly interpreted the Constitutional issue.

In ruling that the Constitutional challenge presented had been previously decided, the Court of Appeals cited Marriage of Giroux, 41 Wash.App. 315, 704 P.2d 160 (1985). Petitioner's challenge was much broader, specifically that the Former Spouses' Protection Act was unconstitutional in its entirety as an impermissible delegation of Congressional authority. The case cited by the Court of Appeals only addressed the retroactive application of the FSPA, and then only in the context of that specific case. The petitioner contends that this feeble attempt to address his Constitutional argument completely ignores the basis of his challenge, and the absolute failure of the state Supreme Court to

ddress this vexatious and critical ssue, or any issue, leaves that basic hallenge unanswered in any manner. etitioner did argue the retroactivity ssue, as he believes Giroux to be learly distinguishable from the pre- ent case as previously discussed. owever, more fundamentally, and as the rimary argument, Petitioner contended hat the FSPA in its entirety is nconstitutional, and that issue was otally ignored by the trial Court, and he appellate courts of Washington.

The Former Spouses' Protection Act s unconstitutional as a delegation of xclusive Congressional authority. learly, the raising and maintaining of he military is exclusively a function eserved by the United States Consti- ution to Congress. By virtue of the onstitutional reservation of authority o Congress, likewise, Congress may not elegate its authority.

(d) The only alleged jurisdiction over the subject matter of this action rests on an unconstitutional Federal Statute

Petitioner has steadfastly resisted and denied the legality of the division of his current wages with a former spouse, pursuant to a divorce decree, in derrogation of R.C.W. 26.16 140, and the Constitution of the United States, Article I, Section 8. He understands that the State of Washington, albeit erroneously, has determined that military retired/retainer pay is deferred compensation and is therefore classified as property, but would again assert that such division is contrary to law, and that the courts of that State therefore lack subject matter jurisdiction over the retired/ retainer pay currently being paid to Petitioner.

As subject matter jurisdiction may be asserted at any stage, Petitioner would again challenge the state courts

jurisdiction over the subject matter of this action. The FSPA, effective on February 1, 1983, created no jurisdiction over acts effected and adjudicated 3 years prior. That statute was not retroactive. Even were this Court to find that at the present time, the courts of the states have jurisdiction based upon the passage of the FSPA, those courts had no jurisdiction in 1980. The Court in McCarty, supra, restated pre-existing federal law. McCarty didn't change the law. As this Court stated in Mansell v. Mansell, 490 U.S.581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989), pre-existing federal law "completely pre-empted the application of state community property laws to military retirement pay", and that pre-existing federal law could only be overcome by Congress "enacting an affirmative grant of authority giving the states the power . . ." Id at 2029.

Congress attempted to do so with

the FSPA, though unconstitutional, but that attempt was made after the Decree of Dissolution in this case had been long since final, and after the single condition subsequent in the Decree had come to pass. The courts of the State of Washington had no authority prior to the passage of the FSPA, if they acquired any then. Without authority, those courts had no jurisdiction. Pre FSPA law completely pre-empted state law. McCarty, supra; Mansell, supra.

Pre-emption by the federal government, quite simply, deprives state courts of subject matter jurisdiction. McCulloch v. Maryland, 4 Wheat 316, 17 U.S. 316, 4 L.Ed. 529 (1818). If a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim of validity, and this is true even though the state action in question was taken within a sphere in which the states

could otherwise act. Free v.Bland, supra, at 666. "Specifically, a state divorce decree, like other law governing economic aspects of domestic relations, must give way to clearly conflicting federal enactments." Ridgway v. Ridgway, 454 U.S. 46, 54 , 70 L.Ed. 2d 39, 102 S.Ct 49 (1981).

CONCLUSION

The unconstitutional effects are very simple. Firstly, Congress cannot delegate to the states that authority and responsibility which belongs exclusively to Congress. They have done so with the Uniformed Services Former Spouses' Protection Act. Any attempt to equate them with the Foreign Service retirement system, the CIA retirement system or even the federal judiciary retirement system and the former spouse provisions of these systems, is simply mixing fantasy and reality. All the other systems are contributory systems,

eferred compensation systems.

Secondly, the Fourteenth Amendment f the United States Constitution pro-ides and guarantees to Petitioner that [n]o State... shall deprive any person f life, liberty, or property, without e process of law;...". The modifi-tion of the judgment is unconstitu-onal in violation of the Fourteenth endment. At the time Petitioner rried Respondent (May, 1961), and ring his tenure in the military rvice, to the time the parties parated (February, 1979), and until e Decree of Dissolution was entered ugust 14, 1980), military retired pay s the personal entitlement of the litary member, Wissner v. Wissner, pra; McCarty v. McCarty, supra.

Thirdly, the contract clause of e Constitution prohibits any court om vitiating any otherwise legal, oper, binding, and particularly a eviously adjudicated contract between

hese parties. Fourthly, no ex-post acto legislation or bills of attainder re Constitutionally permissible, nor s retrospective application of legis- ation allowed in this case.

Clearly it is not constitutionally ermissible to enact legislation in 983 which transforms conduct under- aken in 1980 into a loss of property ights. Appellant had no notice or pportunity to be heard at the time of he proposed conversion of his pay from "personal entitlement" to a "commun- y property asset".

For over one hundred years, this ourt has consistently held that notice nd opportunity to be heard in a timely nner are essential ingredients of due ocess, Pennoyer v. Neff, 95 U.S. 714, L.Ed. 565 (1877); Mullane v. Central nover Bank & Trust, 339 U.S. 306, 94 Ed. 865, 70 S.Ct. 652 (1950). In titioner's case, the giving of notice Wash- ington, some eight years after

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courts of this state lost any
isdiction over the Petitioner; to
ege that conduct which has, by
sequent federal Legislative enact-
t, even if it were proper legis-
ion, had become the basis for
rusion upon his property rights, is
ugnant to the United States Consti-
ion, Fourteenth Amendment.

The conclusion is inescapable.
courts below should be reversed for
r reasons. Firstly, the very
mise upon which the sought after
rification/modification was based,
upon a wholly unconstitutional Act
the United States Congress. This
rt should so find and reverse on
t basis. Secondly, the courts below
uld be reversed on the basis that
y have, by decision, taken the
rent and future wages of the
itioner for the benefit of another,
his spouse, in violation of the
rteenth Amendment of the Constitu-

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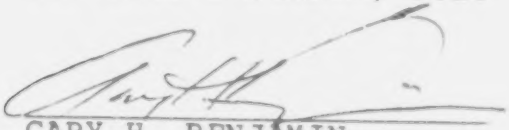
n of the United States, and in lation of R.C.W. 6.15.020 (formerly .W. 6.16.030) and R.C.W. 26.16.140. rdly, the courts below should be ersed on the basis that the courts ow have rewritten a final and ding decree, a decree that was mbiguous and all encompassing, a rite that the courts are not per- ted to do. Fourthly, the courts ow should be reversed on the basis by decision, the courts below ied a statute enacted in 1983 eit unconstitutional) to a final sion of the courts entered in 1980, such retrospective application is idden by both the state and federal titutions.

Based upon the foregoing law and ment, Petitioner respectfully est this Court to reverse the sion of the Washington State eme Court, with instruction to nd this matter to dismiss these

proceedings, and restore the parties to the position of the final, unambiguous and final decree of August 15, 1980.

Respectfully Submitted this 30th day of August, 1991.

BENJAMIN & PERREY, P.S.



GARY H. BENJAMIN
Attorney for Petitioner

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

91-890

NO:_____

In the Supreme Court of the United States

October Term, 1991

DAVID A. NORDSTROM,

Petitioner,

vs.

LINDA E. NORDSTROM,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GARY H. BENJAMIN
Attorney at Law

BENJAMIN & PERREY, P.S.
N. 2702 Argonne, Suite E
Spokane, Wa 99212-2368
(509) 922-5345

(k)

APPENDIX

Table of Contents

A. Findings of Fact, Conclusions of Law and Decree of Dissolution (August 15, 1980) A-1

B. Findings of Fact and Conclusions of Law re: Clarification of Military Retirement (August 29, 1989); and Order re: Clarification of Military Retirement (August 29, 1989) B-1

C. Findings of Fact and Conclusions of Law re: Clarification of Military Retirement (November 21, 1989); and Order re: Clarification of Military Retirement (November 21, 1989) C-1

D. Opinion of the Court of Appeals Division III, (February 26, 1991) D-1

E. Order denying Petition for Review by the Washington State Supreme Court (June 4, 1991) . E-1

F. Uniformed Services Former Spouses' Protection Act (10 U.S. C. 1408)[as originally enacted and modified through 1984]. . . F-1

G. Uniformed Services Former Spouses' Protection Act (10 U.S. C. 1408)[after modification by Congress, and signed into law November 5, 1990] G-1

H. Congressional Record - House pg 12194, October 23, 1990 . . H-1

I. Letter, Senator Adams, March 20, 1991 . . . . . I-1

J. 29 U.S.C. 1002(32) and 29 U.S.C. 1003 . . . . . J-1

K. Was.Rev.Code Ann. 6.15.020 and Wash.Rev.Code Ann. 26.16.140 . . . . . K-1

L. Constitution of the United States, Article I, section 8; Article I, section 9; Article I section 10; Article VI, clause 2; and the Fifth, Thirteenth and Fourteenth Amendments . . . L-1

M. 10 U.S.C. 101; 267; 276; 672; and 688 . . . . . M-1

In the Supreme Court of the United States

October Term, 1991

DAVID A. NORDSTROM,

Petitioner,

vs.

LINDA E. NORDSTROM,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

IN RE: The Marriage of		
DAVID A. NORDSTROM	)	
	)	
Petitioner,	)	NO. 80300285-4
	)	
AND	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF
LINDA E. NORDSTROM	)	LAW AND DECREE OF
	)	DISSOLUTION
Respondent.	)	

THIS MATTER having come on regularly for hearing this date, the Petitioner appearing in person and by and through his attorney, CARL MAXEY, and Respondent appearing in person and by and through her attorney, ROBERT CORLETT, and the Court having heard the testimony and having considered the evidence and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

I.

The Petitioner and Respondent were residents of the County of Spokane,

State of Washington, at the time of filing of the Petition for Dissolution herein, and the Court has jurisdiction over the parties and the subject matter herein.

II.

That the perties were married at Seattle, Washington on May 5, 1961 and ever since that date have been and are now husband and wife.

III.

That the parties have been living separate and apart since on or about February 16, 1979.

IV.

That the parties entered into a Separation Agreement dated February 16, 1979, which should be set aside.

V.

That the marital relationship between the parties is irretrievably broken.

VI

That two children have been born as

issue of this marriage, to-wit: THERESA NORDSTROM, born June 25, 1964 and REBECCA NORDSTROM, born September 7, 1962.

VII.

That the Petitioner is a fit and proper person to have the care, custody and control of the minor children of the parties subject to reasonable rights of visitation by the Respondent. In this connection, the minor child, THERESA NORDSTROM, has certain funds in trust on deposit at the Bank of America in Sacramento, California. Said trust was established as a result of a lawsuit wherein the child was bitten by a dog. Both the Petitioner and Respondent are named as Trustees for the minor child, Theresa Nordstrom. Effective immediately, Petitioner herein, DAVID A. NORDSTROM, shall be named as the sole trustee for said trust and all records shall be changed to reflect same.

VIII.

Respondent herein does have the ability to support herself and is a fit and able bodied person. However, she plans on relocating to Seattle and Petitioner shall pay her the sum of $100.00 per month for a period of three months, commencing July 15, 1980, and continuing each month through September 15, 1980.. Petitioner shall also reimburse Respondent the sum of $41.00 for her insurance upon demand by the Respondent.

IX.

The parties have already divided the community property and the property shall remain with the party holding same. Petitioner's future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment. However, if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct 802 (January 1979),

then the pension shall revert in its entirety to Petitioner.

X.

The parties have incurred miscellaneous community indebtedness and Petitioner shall pay same holding Respondent harmless from the collection thereof. Any obligations incurred after February 16, 1979 shall be the sole and separate obligation of the party incurring same.

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction over the Petitioner and Respondent and over the subject matter herein.

II.

That Petitioner, DAVID A. NORDSTROM, should be granted a Decree of Dissolution and [sic] Marriage dissolving the bonds of matrimony now existing between the Petitioner and Respondent.

III.

That the Petitioner, DAVID A.

NORDSTROM, shall be awarded the care custody and control over the minor children of the parties, THERESA NORDSTROM, born June 25, 1964 and REBECCA NORDSTROM, born September 7, 1962, subject to the Respondent receiving reasonable rights of visitation.

IV.

That the minor child, THERESA NORDSTROM, has certain funds in trust on deposit at the Bank of America in Sacramento, California. Said trust was established as a result of a lawsuit wherein the child was bitten by a dog. Both the Petitioner and Respondent herein are named as Trustees for the minor child, Theresa Nordstrom. Effective immediately, Petitioner shall be named as the sole trustee for said trust.

V.

That the Respondent herein has the ability to support herself and is a fit

and able bodied person. However, she plans on relocating to Seattle and Petitioner shall pay her the sum of $100.00 per month for a period of three months, commencing July 15, 1980 and continuing each month on the 15th through the month of September, 1980. Petitioner shall also reimburse Respondent the sum of $41.00 for her insurance upon demand by the Respondent.

VI.

The parties have already divided the community property and the property shall remain with the party holding same. Petitioner's future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment. However, if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct 802 (January 1979), then the pension shall revert in its entirety to Petitioner.

VII.

The parties have incurred miscellaneous community indebtedness and Petitioner shall pay same holding Respondent harmless from the collection thereof. Any obligations incurred after February 16, 1979 shall be the sole and separate obligation of the party incurring same.

DECREE OF DISSOLUTION

The Findings of Fact and Conclusions of Law having been entered, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I.

That the marriage between DAVID A. NORDSTROM and LINDA E. NORDSTROM is hereby dissolved.

II

That the Petitioner is hereby granted the care custody and control over the minor children of the parties, THERESA NORDSTROM, born June 25, 1964

and REBECCA NORDSTROM, born September 7, 1962, subject to reasonable rights of visitation by Respondent.

III.

That the minor child, THERESA NORDSTROM, has certain funds in trust on deposit at the Bank of America in Sacramento, California as a result of a lawsuit wherein the child was bitten by a dog and both Petitioner and Respondent are named as Trustees of said account. It is ordered that Petitioner shall forthwith be named as the sole trustee of said trust , consisting of the follwoing accounts:

1. Account No. 1480-81637, in the balance of $6,399.52 (balance at June 30, 1980).

2. Account No. 1482-81636, in the balance of $1,599.78 (balance at June 30, 1980).

2. Account No. 1481-02713, in the balance of $749.48 (balance at June 30, 1980).

That Respondent herein has the ability to support herself and is a fit and able bodied person. However, she

plans on relocating to Seattle and Petitioner shall pay her the sum of $100.00 per month for a period of three months, commencing July 15, 1980 and continuing each month on the 15th through the month of September, 1980. Petitioner shall also reimburse Respondent the sum of $41.00 for her insurance upon demand by the Respondent.

V.

That the Separation Agreement entered into between the parties on February 16, 1979 is hereby set aside and declared null and void.

VI.

That the parties have already divided the community property and the property shall remain with the party holding same. Petitioner's future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment, subject to the result of any decision

reached by the United States Supreme Court. However, if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct 802 (January 1979), then the pension shall revert in its entirety to Petitioner.

VII.

The parties have incurred miscellaneous community indebtedness and Petitioner shall pay same holding Respondent harmless from the collection thereof. Any obligations incurred after February 16, 1979 shall be the sole and separate obligation of the party incurring same.

DONE IN OPEN COURT this 15th day of August, 1980.

-s-

JUDGE

Presented by:

FREDRICKSON, MAXEY,
BELL & STILEY, P.S.

BY: -s-
CARL MAXEY

-s-
DAVID NORDSTROM

Approved, Notice of Presentment Waived:

BY: -s-
ROBERT CORLETT

APPENDIX B

F I L E D
Aug 29 1989
Superior Court
Spokane County, WA.

SUPERIOR COURT, STATE OF WASHINGTON
COUNTY OF SPOKANE

IN RE THE MARRIAGE OF: DAVID NORDSTROM Petitioner, and LINDA E. NORDSTROM, Respondent.	NO. 80300285-4 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: CLARICATION OF MILITARY RETIREMENT

THIS MATTER having come on for hearing on July 24, 1989 before the undersigned Court Commissioner on Respondent's Motion and Affidavit for Order to Show Cause regarding clarification of military retirement, the petitioner appearing by and through his attorney Gary Benjamin of Benjamin and Perrey, P.S. and respondent appearing by and through her attorney Nancy A. Wainwright of Miller and Wainwright, P.S., and the court having heard the

arguments of counsel and having considered the briefs on file and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

I.

The burden was on Petitioner David A. Nordstrom to appeal the entry of the Decree of Dissolution based on subsequent case law.

II.

The argument of laches against respondent Linda E. Nordstrom is not effective. Mrs. Nordstrom promptly requested assistance from the Court at the time she was notified of the change in entitlement to military retirement.

III.

David Nordstrom was the petitioner and represented by counsel and submitted the issue of military retirement to the Court to be resolved in the initial dissolution actior.

V.

The award of military retirement to respondent pursuant to the Decree of Dissolution on August 13, 1980 was properly before the Court. The payment by the military to Mrs. Nordstrom was correct and proper pursuant to the Decree.

VI.

Mrs. Nordstrom does not owe petitioner for any back payments for military retirement from the date of the decree to present.

VII.

Petitioner owes respondent one-half of the net desposable [sic] military retirement pay from January 1989 and thereafter until further order of the Court.

VIII.

There was no financial information before the Court so ther was no award of attorney fees to either party.

CONCLUSIONS OF LAW

I.

The Court at the time of entry of the Decree of Dissolution had subject matter jurisdiction over the parties.

II.

The Soldier's and Sailor's Civil Relief Act 50 U.S.C. 501 was complied with.

III.

The net disposable military retirement of the petitioner is to be divided between the parties.

IV.

The respondent does not owe back payments to petitioner for the military retirement paid from January 1, 1985 to present.

V.

The petitioner owes respondent one-half of his net disposable monthly military retirement from January 1989 and thereafter until further order of the Court.

VI.

Each party is to be responsible for their own attorney fees.

DATED THIS 29th day of August, 1989.

-s-
ROYCE MOE
Judge/Court Commissioner

PRESENTED BY:
MILLER AND WAINWRIGHT, P.S.

-s-
Nancy A. Wainwright, WSBA #_____
Attorney for Respondent

APPROVED AS TO FORM,
NOTICE OF PRESENTMENT WAIVED:

Attorney for Petitioner
WSBA # _____

F I L E D
Aug 29 1989
Superior Court
Spokane County, WA.

SUPERIOR COURT, STATE OF WASHINGTON
SPOKANE COUNTY

IN RE THE MARRIAGE OF	)
DAVID NORDSTROM	) NO. 80300285-4
Petitioner,	) ORDER
and	) RE: CLARIFICATION OF
LINDA E. NORDSTROM,	) MILITARY RETIREMENT
Respondent.	)

THIS MATTER having come on for hearing on July 24, 1989 on Petitioners [sic] Motion for Order to Show Cause Re: Clarification of Military Retirement, the petitioner appearing by and through his attorney Gary Benjamin of Benjamin and Perrey, P.S. and respondent appearing by and through her attorney Nancy A. Wainwright of Miller and Wainwright, P.S., and the Court having heard the arguments of counsel and reviewed the briefs and record

herein, NOW THEREFORE

IT IS ORDERED ADJUDGED AND DECREED that Petitioner shall pay to respondent the sum of one half of his monthly military retirement from January 1989 and hereafter until further ot the court;

IT IS FURTHER ORDERED ADJUDGED AND DECREED that respondent shall not owe or pay to petitioner any back payments for military retirement paid to her from the date of decree to present.

DATED THIS 29th day of August, 1989.

-s-
ROYCE MOE
Judge/Court Commissioner

PRESENTED BY:
MILLER AND WAINWRIGHT, P.S.

-s-
Nancy A. Wainwright, WSBA #_____
Attorney for Respondent

APPROVED AS TO FORM,
NOTICE OF PRESENTMENT WAIVED:

Attorney for Petitioner
WSBA # _____

APPENDIX C

F I L E D
Nov 21 1989
Superior Court
Spokane County, WA.

SUPERIOR COURT, STATE OF WASHINGTON
COUNTY OF SPOKANE

IN RE THE MARRIAGE OF:	
DAVID NORDSTROM	NO. 80300285-4
Petitioner,	FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: CLARICATION OF MILITARY RETIREMENT
and	
LINDA E. NORDSTROM,	
Respondent.	

THIS MATTER having come on for hearing on October 26, 1989, before the undersigned Judge on Petitioner's Motion for Revision of Commissioner's Order Re: Clarification of Military Retirement, the Petitioner appearing by and through his attorney, GARY H. BENJAMIN of BENJAMIN & PERREY, P.S., and the Respondent appearing by and through her attorney, NANCY A. WAINWRIGHT, of MILLER & WAINWRIGHT, P.S., and the Court having heard the

arguments of counsel, and having considered the briefs on file, and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

I.

That prior to 1979 and the Hisquerdo decision, 439 U.S. 5722, 99 S.Ct 802 (1979), the courts of this state routinely divided military retirement as a community asset in a divorce proceeding.

II.

That in the present case, the trial court considered all of the property of the parties, and decided to award one-half of the retirement to Respondent at the time of Petitioner's retirement, subject to a condition subsequent, stated in the Findings of Fact and Conclusions of Law as:

> The parties have already divided the community property and the property shall remain with the party holding same. Petitioner's future military retirement

> shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment. However, if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct. 802 (January 1979), then the pension shall revert in its entirety to Petitioner.

and as stated as enterd in the Decree of Dissolution entered by the Court as:

> The parties have already divided the community property and the property shall remain with the party holding same. Petitioner's future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment, subject to the result of any decision reached by the United States Supreme Court. However, if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct. 802 (January 1979), then the pension shall revert in its entirety to Petitioner.

III

At the time of trial, the court did not know when the Petitioner, Mr. Nordstrom would retire.

IV

That the language in paragraph VI of the Decree of Dissolution is unclear as to whether the court referred to is

the State of Washington Supreme Court or the United States Supreme Court.

V.

That this Court finds that the trial court may not have been aware of the impending case of McCarty v. McCarty, 410 U.S. 253, 101 S.Ct. 2728 (1981), and that the reference in paragraph VI of the Decree of Dissolution is therefore unclear.

VI.

That the law to be applied to the condition subsequent is the law that was in effect at the time Petitioner retired.

VII.

That the Petitioner retired effective January 1, 1985. The law in effect at that time was 10 U.S.C. 1408 et seq.

CONCLUSIONS OF LAW

I.

The Court shall strictly construe the unclear language of the Decree of Dissolution.

II.

The language of the condition subsequent does not apply until the Petitioner's date of retirement.

III.

The law in effect at that time the Petitioner retired was 10 U.S.C. 1408 which provided for payment to the non-military spouse of military retirement.

IV.

Respondent shall receive one-half of Petitioner's net disposable military retirement because the condition subsequent was not in the law the date of retirement.

DONE IN OPEN COURT this 21st day of November, 1989.

-s-
ROBERT D. AUSTIN
J U D G E

Presented by:
MILLER & WAINWRIGHT, P.S.

By: -s-
NANCY A. WAINWRIGHT
Attorney for Respondent
WSBA # 8698

Approved as to form,
Notice of Presentment
Waived
BENJAMIN & PERREY, P.S.

By: -s-
GARY H. BENJAMIN
Attorney for Petitoner

F I L E D
Nov 21 1989
Superior Court
Spokane County, WA.

IN THE SUPERIOR COURT, STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

IN RE THE MARRIAGE OF: DAVID NORDSTROM Petitioner, and LINDA E. NORDSTROM, Respondent.	NO. 80300285-4 ORDER RE: Clarification of Military Retirement

THIS MATTER having come on for hearing on October 26, 1989 on Petitioner's Motion for Review of Commissioner's Order Re: Clarification of Military Retirement the Petitioner appearing by and through his attorney, Gary Benjamin of Benjamin and Perrey, P.S. and Respondent appearing by and through her attorney, Nancy A, Wainwright of Miller & Wainwright, P.S. and the court having heard the argument of counsel and reviewed the briefs and

record herein, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUSTED AND DECREED that Petitioner's motion to revise the Commissioner's Order of August 29, 1989 is denied.

-s-
ROBERT D. AUSTIN
Judge

PRESENTED BY:
Miller & Wainwright, P.S.

-s-
Attorney for Respondent
Washington State Bar No. 8698

APPROVED AS TO FORM,
NOTICE OF PRESENTMENT WAIVED:

-s-
Attorney for Petitioner
Washington State Bar No. 14143

APPENDIX D

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

In Re the Marriage of: DAVID A. NORDSTROM, Appellant and LINDA E. NORDSTROM Respondent.	)	No. 10450-8-III
	)	Division Three Panel One
	)	FILED
	)	Feb 26 1991

SHIELDS, J. --The Superior Court denied David Nordstrom's motion to revise a family court commissioner's order which clarified an earlier decree of dissolution and held Linda Nordstrom entitled to half of Mr. Nordstrom's military pension. Mr. Nordstrom appeals; we affirm.

David and Linda Nordstrom were married in 1961. They separated in 1979 after 18 years of marriage. The decree of dissolution was entered in 1980. Mr Nordstrom's attorney drafted the findings, conclusions and decree of

dissolution. The decree of dissolution reflects a statement of a finding and conclusion:

> Petitioner's [David's] future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment, subject to the result of any decision reached by the United States Supreme Court. However, if it adopts the rulings of Hisquerdo v. Hisquerdo, [439 U.S. 572, 59 L.Ed2d 1] 99 S.Ct. 802 (January, 1979), then the pension shall revert in its entirety to Petitioner.

At the time of this decree, non-disability retirement pay was recognized as property subject to division in a dissolution proceeding. Wilder v. Wilder, 85 wn.2d 364, 534 P.2d 1355 (1975); Washington State Bar Ass'n Community Property Deskbook, sec. 3.61 (2d Ed. 1989).

Mr. Nordstrom retired from the Air Force on January 1, 1985. In 1986, Ms. Nordstrom notified the Air Force she should be receiving 50 percent of Mr. Nordstrom's military retirement. The

Air Force complied and began making payments to her. In December 1988, Mr. Nordstrom contacted the Air Force, requesting it stop payment to Ms. Nordstrom; payments were stopped in June 1989. Ms. Nordstrom immediately moved for clarification of the dissolution decree concerning military retirement. The family court commissioner determined Ms. Nordstrom was entitled to half the net disposable military retirement. Mr. Nordstrom moved for revision of the commissioner's order. After a hearing, the Superior Court determined: the trial court at the time of the dissolution had awarded one-half of the future military retirement to Ms. Nordstrom subject to a condition subsequent; the language of the decree was unclear; a strict construction of the unclear language indicated the condition subsequent did not apply until the date of Mr. Nordstrom's retirement; and the law

in effect at the time of Mr. Nordstrom's retirement permitted division of nondisability retirement pay to the non-military spouse.

A brief review of the history of Hisquerdo v. Hisquerdo, 439 U.S. 572, 59 L.Ed.2d 1, 99 S.Ct. 802 (1979) is in order. Hisquerdo held federal law preempts state courts from considering railroad retirement pay as property divisible upon dissolution. Community Property Deskbook sec. 3.62. Three months before the Nordstrom dissolution decree was signed, the Supreme Court adopted the reasoning of Hisquerdo in In re Marriage of Larango, 93 Wn.2d 460, 610 P.2d 907 (1980).

In 1981, the Hisquerdo reasoning applied in McCarty v. McCarty, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981). It held federal law preempts state courts from considering nondisability military retirement pay as property divisible upon dissolution.

In September 1982, the Supreme Court applied the McCarty rule In re Marriage of Dessauer, 97 Wn.2d 831, 650 P.2d 1099 (1982), overruled in In re Marriage of Smith, 100 Wn.2d 319, 324, 669 P.2d 448 (1983). However, the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. sec. 1408, went into effect on February 1, 1983. The USFSPA freed state courts to award up to a 50 percent interest in nondisability military retirment pay upon dissolution. It also eliminated the retroactive application of McCarty. 10 U.S.C. sec 1408(c)(1). See In re Marriage of MacDonald, 104 Wn.2d 745, 709 P.2d 1196 (1985) and other cases cited in Community Property Deskbook sec. 3.61, at 3-73. Because of the USFSPA, in September 1983 Dessauer, as noted, was ovrruled in In re Marriage of Smith, 100 Wn.2d 319, 669 P.2d 448 (1983). Thus, at the time Mr. Nordstrom became eligible for his nondis-

ability military retirement pay in January 1985, state courts were not preempted from awarding an interest in nondisability retirement pay to non-military spouses.

Mr. Nordstrom first contends the USFSPA is an unconstitutional delegation of authority. The constitutionality of the USFAPA has been previously challenged unsuccessfully. See In re Marriage of Giroux, 41 Wn.App. 315, 321, 704 P.2d 160 (1985).

Second, Mr. Nordstrom contends retroactive application of the statute unconstitutionally deprives him of property without due process. That argument was dismissed in In re Marriage of MacDonald, supra, which held the husband did not have a vested right to his military retirement pay:

> [H]e may have expected to be awarded his military retired pay, but this expectation in the continuance of existing law is not equivalent to a vested property right. Under state law, all property of a married couple . . . is subject to division by the court in a dissolution of

> their marriage. . . . As between husband and wife while married, neither has a vested right to their property, nor does the trial court's division of property create a vested right.

MacDonald, at 750. See also In re Marriage of Giroux, supra at 319-21.

Third, Mr. Nordstrom contends the court erred in characterizing nondisability military retirement pay as property which can be divided. He argues military retirement pay is a "personal entitlement" to retainer pay* earned on a day-by-day basis upon retirement, citing Wissner v. Wissner, 338 U.S. 655, 94 L.Ed. 424, 70 S.Ct. 398, reh'g denied, 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 619 (1950) and RCW 6.15.020 and its predecessor, former RCW 6.16.030. Since Wissner is a federal preemption case relating to National Service Life Insurance, it is

---

*While on inactive duty status in retirement, the service member has continuing obligations and restrictions and is subject to recall to active duty.

not applicable in view of the enactment of the USFSPA. He also argues former RCW 6.16.030, in effect in 1980, precluded division of nondisability retirement pay upon dissolution, We do not find merit to this argument. That statute did not preclude division of nondisability military retirement pay upon dissolution; it only precluded execution, attachment or seizure of payments when received. In 1987, the statute was amended and recodified as RCW 6.15.020, to preclude garnishment also.

Fourth, Mr. Nordstrom contends the court erred in interpreting unambiguous language. He claims the decree clearly stated the award of the pension to Ms. Nordstrom was subject to a condition subsequent: if the United States Supreme Court decided McCarty, applying the rule of Hisquerdo to military retirement pay, the pension reverted to Mr. Nordstrom.

Fleming v. August, 48 Wn.2d 131, 135, 291 P.2d 639 (1955) defines a condition subsequent in this manner: "[I]f it is agreed that the contract will cease to be binding if some event occurs in the future, then it is delivered upon a condition subsequent" whereas "the condition precedent must be a condition precedent to the contract becoming a valid obligation and not merely precedent to its payment". The decree in this case was subject to both a condition precedent and a condition subsequent. Mr. Nordstrom had to retire before he was obligated to pay Ms. Nordstrom half of his retirement. This was a condition precedent. Once this condition precedent was met in 1985, creating the obligation, then the condition subsequent might operate to terminate it. However, in 1985, the USFSPA was in effect and the federal preemption of McCarty no longer existed; therefore, the condition subsequent

has never occured. Thus, the court did not err in determining Ms. Nordstrom was entitled to half of Mr. Nordstrom's military retirement.*

Ms. Nordstrom requests attorney fees on appeal pursuant to RCW 26.09.140 and RAP 18.1. RCW 26.09.140 provides in part:

> Upon any appeal, the appellate court may, in its discretion, order a aprty to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

However, fees may be awarded under this provision only after the requesting party's needs are balanced against the other party's ability to pay. In re Marriage of Bocanegra, 58 Wn.App. 271, 282, 792 P.2d 1263 (1990), review denied, 116 Wn.2d 1008 (1991). Here,

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*Whether Ms. Nordstrom is entitled to half of Mr. Nordstrom's full retirement for 20 years of service, or whether she is only entitled to half of Mr. Nordstrom's retirement earned during the years she was married to him is not an issuee before us.

Ms. Nordstrom does not demonstrate either her need or Mr. Nordstrom's ability to pay. Attorney fees are therefore denied.

The decision of the Superior Court is affirmed.*

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*Mr. Nordstrom also contends the court erred: in modifying the decree 8 years after it became final, and allowing Ms. Nordstrom to bring her motion to clarify after the action became barred by waiver, laches and estoppel. However, the court did not modify the decree; it merely clarified it. Further, Ms. Nordstrom brought her action to clarify promptly after the military ceased payments to her. Thus the doctrines of waiver and laches are inapplicable. Mr. Nordstrom is likewise precluded from arguing equitable estoppel.

Mr. Nordstrom additionally contends the court erred in retroactively applying the USFSPA. After oral argument Mr. Nordstrom submitted to this court a copy of the November 5, 1990 amendments to the USFSPA which clarify the intent of Congress was to give prospective effect only to the USFSPA. The USFSPA became effective in 1983. It was not applied in this case until Mr. Nordstrom's retirement in 1985. Thus, the USFSPA is not being applied retroactively here. In his postargument materials, Mr. Nordstrom refers to Mansell v. Mansell, 490 U.S. 581, 104 L.Ed.2d 675, 109 S.Ct. 2023 (1989). Contrary to Mr. Nordstrom's contention, that case does not hold state courts never had authority to treat military retirement pay as pro-

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

-s-
Shields, J

WE CONCUR:

-s-
Green, CJ

-s-
Munson, J

---

perty or to divide it in any fashion. Rather, the Mansell case held state courts only had the authority to treat disposable military retirement pay as property. Because this case only concerns disposable military retirement pay, Mansell is inapplicable.

APPENDIX E

THE SUPREME COURT OF WASHINGTON

In re the Marriage of	)	
	)	
DAVID A. NORDSTROM,	)	
	)	No. 58040-5
Petitioner,	)	
	)	C/A NO:
and	)	10450-8-III
	)	
LINDA E. NORDSTROM,	)	
	)	
Respondent.	)	
	)	

This matter came before Department I of the Court on its June 4, 1991, Motion Calendar on Petition for Review. Department I having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied.

DATED at Olympia, Washington this 4th day of June, 1991.

-s-
ACTING CHIEF JUSTICE

FILED
SUPREME COURT
STATE OF WASHINGTON
1991 JUN-4 PM 2:40
BY C.J. MERRITT

CLERK

APPENDIX F

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

(As originally enacted and as amended through 1984)

TITLE 10 U.S.C.

Sec. 1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means-

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28 [28 USCS sec. 451]) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which-

(A) is issued in accordance with the laws of the jurisdiction of

that court;

(B) provides for-

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)) [42 USCS sec. 662(b)]);

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)) [42 USCS sec. 662(c)]); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title [10 USCS sub.sec. 1201 et seq.]) less amounts which-

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and

forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [5 USCS sub.sec. 101 et seq.; 38 USCS sub.sec. 101 et seq.];

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) [26 USCS sec. 3402(i)] if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title [10 USCS sub.sec. 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section-

(1) service of a court order is

effective if-

(A) an appropriate agent of the Secretary concerned designated for receipt of service court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers'

and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) [50 USCS appx sub.sec. 501 et seq.] were observed; and

(2) a court order is regular on its face if the order-

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other

provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or

retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligiblity for retired or retainer pay, payments may not be made under this section to the extent that they include an

amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a

member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to

direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall-

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such courts orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the

lesser of-

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's dis-

posable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659] and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus-

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as

that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659], both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-served basis. Such court orders and

legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659] with respect to a member may not exceed 65 percent of the disposable retired or retainer

pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659], provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former

spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) [42

USCS sec. 649] in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of

information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Sept. 8, 1982, P.L. 97-252, Title X, Sec. 1002(a), 96 Stat. 730; Oct. 19, 1984, P.L. 98-525, Title VI, Part E, Sec. 643(a)-(d), 98 Stat. 2547.)

APPENDIX G

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (10 U.S.C 1408)

[As amended upon signing of the Defense Appropriations Bill by the President on November 5, 1990]

TITLE 10 U.S.C.

Sec. 1408. Payment of retired pay in compliance with court orders

(a) DEFINITIONS- In this section:

(1) "Court" means-

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States- (as defined in section 451 of title 28 [28 USCS sec. 451]) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which-

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for-

(i) payment of child support (as defined in section 462 (b)of the Social Security Act (42 U.S.C. 662(b)) [42 USCS sec. 662(b)]);

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)) [42 USCS sec. 662(c)]); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken

within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired pay" means the total monthly retired pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title [10 USCS sub.sec. 1201 et seq.]) less amounts which-

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay.

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by court-martial or as a

result of a waiver of retired pay required by law in order to recieve compensation under title 5 or title 38;

(C) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(D) are deducted because of an election under chapter 73 of this title [10 USCS sub.sec. 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that

member.

(7) The term "retired pay" includes retainer pay.

(b) EFFECTIVE SERVICE OF PROCESS- For the purposes of this section-

(1) service of a court order is effective if-

(A) an appropriate agent of the Secretary concerned designated for receipt of service court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible,

the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) [50 USCS appx sub.sec. 501 et seq.] were observed; and

(2) a court order is regular on its face if the order-

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) AUTHORITY FOR COURT TO TREAT RETIRED PAY AS PROPERTY OF THE MEMBER AND SPOUSE-

(1) Subject to the limitations of this section, a court may treat dis-

posable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's former spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified or approved property settlement incident to such decree) affecting the member and the member's former spouse (A) was issued before June 25, 1981 and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the

member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the

disposal retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) PAYMENTS BY SECRETARY CONCERNED TO SPOUSE OR FORMER SPOUSE-

(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this

section) from the disposable retired pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to retired pay.

(2) If the spouse or former spouse to whom payments are to be made

under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligiblity for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in

accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former

spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(e) LIMITATIONS-

(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of

disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall-

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such courts orders based on when such court orders were effectively served and

the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of-

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subpara-

graph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659] and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus-

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659], both of which provide for payments during a month from the same member, satis- faction of such court orders and legal process from the retired or retainer

pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satis- faction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659] with respect to a member may

not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S. C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S. C. 659) [42 USCS sec. 659], provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be

considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this

section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 649] in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) IMMUNITY OF OFFICERS AND EMPLOYEES OF UNITED STATES-

(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection

(h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) NOTICE TO MEMBER OF SERVICE OF COURT ORDER ON SECRETARY CONCERNED-

A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Sept. 8, 1982, P.L. 97-252, Title X, Sec. 1002(a), 96 Stat. 730; Oct. 19, 1984, P.L. 98-525, Title VI, Part E, Sec. 643(a)-(d), 98 Stat. 2547.)

APPENDIX H

H12194 October 23, 1990

CONGRESSIONAL RECORD - HOUSE

Amendments to the Uniformed Services Former Spouses' Protection Act (sec 555)

The House bill contained a provision (sec 555) that would make two amendments to the Uniformed Services Former Spouses' Protection Act (USFSPA) (10 U.S.C. 1408).

The Supreme Court in McCarty v. McCarty, 453 U.S. 210 (1981) ruled that retired pay could not be subject to division between the military member and the member's spouse as part of a divorce proceeding absent a federal statute permitting such division. Congress subsequently passed USFSPA to permit the division of military retired pay under specified circumstances, and to provide certain other benefits to former spouses of retired members of

the armed forces. The intent of Congress, as expressed in the legislative history, was for this new law to have prospective effect only. A number of courts, however, have interpreted the law differently, and have re-opened pre-McCarty decisions in order to award a share of retired pay to former spouses.

The House bill would provide that if a final decree of divorce, dissolution, annulment, or legal separation was issued before the McCarty decision and did not treat military retired pay as the property of both the retired member and the former spouse, then the court, subsequent to McCarty, may not divide retired pay between the retired member and the former spouse. If a court, subsequent to McCarty, had entered such an order, the House bill would require the member to make any payments that were due before the date of enactment of this bill, but the

member would be relieved of the obligation to make any further payments.

The house bill would also revise the computation of the amount of disposable retired pay that is subject to division under USFSPA. The current law excludes tax withholdings and certain federal debts of the servicemember. The House bill would eliminate these exclusions with respect to decrees of divorce, dissolution, annulment, or legal separation that become effective after the 90-day period beginning on the date of enactment of this bill.

The Senate amendment contained no comparable provision.

The Senate recedes with an amendment. The conferees agree that the original intent of Congress was to give prospective effect only to USFSPA without retroactive opening of pre-McCarty cases. The conferees believe, however, that a reasonable period of time is needed for individuals to make adjust-

ments required by the termination of payments ordered under decrees issued prior to the date of enactment of this bill. Accordingly, the conference agreement would require individuals to continue to make payments ordered prior to the date of enactment of this bill during the two-year period after such enactment.

[end of sec 555]

APPENDIX I

BROCK ADAMS
Washington

UNITED STATES SENATE
Washington, DC 20510-4702

March 20, 1991

Davin* and Kathy Nordstrom
P.O. Box 312
Liberty Lake, WA 99019

Dear Mr. and Mrs. Nordstrom:

Thank you for writing to express your support for modifications to the USFSPA that would prohibit continuous retro-

*So in original

active awards of military retired pay in certain divorce cases. I appreciate hearing from you on this important issue, and I apologize for the delay in responding.

I am pleased to report that several amendments to last year's Department of Defense Authorization bill addressed retroactive awards of military retired pay. Specifically, these amendments prohibited the re-opening or re-litigation of divorce cases settled prior to June 25, 1981. Passage of last year's bill has finally put this contentious issue to rest. I appreciated the benefit of your views as this legislation was considered by the Senate last year.

Again, thank you for your letter. I am grateful for your kind words of support for my position on key military FSPA equity changes. Should you have any

further comments or questions, or if I may be of assistance in any way, please feel free to let me know.

Sincerely,

-s-

Brock Adams
United States Senator

APPENDIX J

Title 29 U.S.C.

Ch. 18 RETIREMENT INCOME SECURITY

Section 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained-

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if-

(1) such plan is a governmental plan (as defined in

section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workman's compensation laws or unemployment compensation or disability insurance laws;

Section 1002.

. . .

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental

plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 [45 U.S.C.A. Sec. 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C.A. Sec. 288 et seq.].

APPENDIX K

REVISED CODE OF WASHINGTON

6.15.020. Pension money exempt

(1) Unless otherwise provided by federal law; any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever, and when a debtor dies, or absconds, and leaves his or her family any money exempted by this section, the same shall be exempt to the family as provied in this section.

(2) The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and

any fund created by such a plan or arrangement, shall be exempt from execution, attachment, or seizure by or under any leal process whatever: Provided, That this subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in such plan to the extent expressly provided for in a qualified domestic relations order (as such term is defined in section 206(d) of the federal employee retirement income security act of 1974, as amended, 29 U.S.C. Sec. 1056(d) or in section 401(a)(13) of the internal revenue code of 1954, as amended).

(3) For the purposes of this section, the term "employee benefit plan" means any plan or arrangement that is subject to the provisions of the federal employee retirement income security act of 1974, as amended, 29 U.S.C. Secs. 1001 through 1461 or that is

described in sections 401(a), 403(a), 403(b), 408, or 409 (as in effect before January 1, 1984) of the internal revenue code of 1954, as amended, or both: Provided, That the term "employee benefit plan" shall not include any employee benefit plan that is excluded from the application of the federal employee retirement income security act of 1974, as amended, pursuant to section 4(b)(1) of that act, 29 U.S.C. Sec. 1003(b)(1).

Formerly Sec. 6.16.030, amended by Laws 1987, ch. 64, Sec. 1. Recodified as Sec. 6.15.020 and amended by Laws 1987, ch. 442, Sub.Sec. 302, 1121. Reenacted and amended by Laws 1988, ch. 231, Sec. 6, eff. March 23, 1988.

26.16.140. Earnings and accumulations of husband and wife living apart, minor children

When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the

separate property of each. The earnings and accumulations of minor children shall be the separate property of the spouse who has their custody or, if no custody award has been made, then the separate property of the spouse with whom said children are living.

Enacted by Code 1881, Sec. 2413. Amended by Laws 1972, Ex.Sess., ch. 108, Sec. 5.

APPENDIX L

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 8. Powers of Congress

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix

the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progrss of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to

exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; - And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. Limitations upon powers of Congress

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of

Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to

time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

. . .

Section 10. Restrictions upon powers of states

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

. . .

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ARTICLE VI

Debts; supremacy; oath

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

. . .

AMENDMENTS

Amendment [V.] Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer

for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIII.

Section 1. Slavery abolished

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Enforcement

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

Section 1. Citizenship rights not to be abridged by states

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 4. What public debts are void

The validity of the public debt of

the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. Power to enforce article

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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APPENDIX M

TITLE 10 U.S.C.

Sec. 101. Definitions

In addition to the definitions in section 1-5 of title 1[1 USC sub.sec. 1-5], the following definitions apply in this title [10 USC sub.sec. 101 et seq.]: . . .

(27) "Pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

. . .

Sec. 267. Ready Reserve; Standby Reserve; Retired Reserve; placement and status of members

(a) There are in each armed force a Ready Reserve, a Standby Reserve, and a Retired Reserve. Each Reserve shall be placed in one of those categories.

(b) Reserves who are on the inactive

status list of a reserve component, or who are assigned to the inactive Army National Guard or the inactive Air National Guard, are in an inactive status. Members in the Retired Reserve are in a retired status. All other Reserves are in an active status.

(Aug. 10, 1956, ch 1041, sec. 1, 70A Stat. 12.)

Sec. 276. Mobilization forces: maintenance

(a) Whenever units or members of the reserve components are ordered to active duty (other than for training) during a period of partial mobilization, the Secretary concerned shall continue to maintain mobilization forces by planning and budgeting for the continued organization and training of the reserve components not mobilized, and make the fullest practicable use of the Federal facilities vacated by mobilized units, consistent with approved joint mobilization plans.

(b) In this section "partial mobilization" means the mobilization resulting from action by Congress or the President, under any law, to bring units of any reserve component, and members not assigned to units organized to serve as units, to active duty for a limited expansion of the active armed forces.

(Aug. 10, 1956, ch 1041, sec. 1, 70A Stat. 13.)

Sec. 672. Reserve components generally

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty

(other than for training) for the duration of the war or emergency and for six months thereafter. However-

(1) a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available; and

(2) a member of the Standby Reserve may not be ordered to active duty under this subsection unless the Director of Selective Service determines that the member is available for active duty.

. . .

(c) So far as practicable, during any

expansion of the active armed forces that requires that units and members of the reserve components be ordered to active duty (other than for training), members of units organized and trained to serve as units who are ordered to that duty without their consent shall be so ordered with their units. However, members of those units may be reassigned after being ordered to active duty (other than for training).

Sec. 688. Retired members

(a) Under regulations prescribed by the Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps, a member of the Retired Reserve who has completed at least 20 years of active service, or a member of the Fleet Reserve or Fleet Marine Corps Reserve may be ordered to active duty by the Secretary of the military

department concerned at any time. The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.

. . .